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IN THE

Supreme Court of the United States

October Term, 1993

DAVID R. KITTAY, Chapter 11 Trustee for
Stockbridge Funding Corporation,

Petitioner,

v.

FARMERS BANK, et al.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

A United States district court in Virginia held that the automatic stay in a bankruptcy case filed and pending in New York did not protect the Chapter 11 trustee's subordinate lien holdings from being extinguished in a foreclosure by a senior lienholder and enjoined the trustee from proceeding in his appointing court under 11 U.S.C. § 105 to protect the lien interests. Did the Court of Appeals for the Fourth Circuit sanction a departure from the usual course of judicial proceedings by declining to review the district court's holding that the stay was inapplicable, on grounds of mootness, and in upholding the validity of the injunction, without making any determination of the district court's jurisdiction?

PARTIES TO THIS PROCEEDING

The Petitioner respectfully certifies that the persons or coporations listed below may have an interest in the outcome of this litigation:

1. David R. Kittay, Chapter 11 Trustee for Stockbridge Funding Corporation

2. The Farmers Bank of Windsor Virginia

3. Dr. Lloyd C. March, Jr.

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On Petition for Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court

David R. Kittay, Chapter 11 Trustee for Stockbridge Funding Corporation, by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 988 F.2d 498 (1993). The first opinion of the United States District Court for the Eastern District of Virginia is reported at 140 Bankr. 387 (1992). The second opinion of the United States District Court for the Eastern District of Virginia is unreported. The opinion of the United States Bankruptcy Court for the Eastern District of Virginia is unreported.

JURISDICTION

Jurisdiction arose in the United States District Court for the Eastern District of Virginia under 28 U.S.C. §158(a) as an appeal from a final order entered by a United States bankruptcy court. Jurisdiction arose in the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 158(d),

which grants jurisdiction to the court of appeals to review decisions of the federal district courts wherein the district court was exercising appellate jurisdiction pursuant to 28 U.S.C. § 158(a). Judgment of the court of appeals was entered on March 8, 1993. A petition for rehearing, with a suggestion for rehearing en banc, was filed March 22, 1993. Rehearing was denied on April 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following United States statutes are involved in this case: 11 U.S.C. §105(a); 11 U.S.C. § 362; 11 U.S.C. §363(f); 11 U.S.C. § 541; 28 U.S.C. §157(a); 28 U.S.C. § 1334; 28 U.S.C. §1409; 28 U.S.C. § 1651(a).

The pertinent text of these statutes is set forth in the appendix to this petition.

STATEMENT OF THE CASE

David R. Kittay ("Kittay") is the Chapter 11 Trustee for Stockbridge Funding Corporation ("Stockbridge"). Stockbridge was a mortgage origination and servicing company that had raised some $50 million from private investors, mostly from the Polish, Hungarian and Russian immigrant communities in New York and New Jersey. When Stockbridge was unable to continue to pay the high rates of interest it had guaranteed these investors, word quickly spread, criminal investigations were commenced and an involuntary Chapter 7 petition was filed against Stockbridge. Approximately 1,000 investors, many of whom had given their life savings to Stockbridge, were in a state of panic.

Kittay converted the case to Chapter 11 and quickly moved to consolidate the assets of Stockbridge, which consisted primarily of mortgage interests in properties throughout several states. Among these were a series of deeds of trust, amounting to millions of dollars, in a project known as Hillpoint Farms in Suffolk, Virginia. Owned and developed by Oceans Holdings, Inc., Hillpoint Farms was the home of Atlantic Film Studios, which was touted in the local media as the future "Hollywood East." Eventually, the Ponzi scheme known as Stockbridge and the pipe dream of a Hollywood East both collapsed under their own weight, leaving despondent investors.

Farmers Bank of Windsor, Virginia ("Farmers") was the holder of the first deed of trust on two parcels at Hillpoint Farms. Lloyd C. March, Jr., a local

dentist, was the holder of subordinate deeds of trust on these parcels, as was Stockbridge. The insolvency of Oceans Holdings had forced March to file for relief under Chapter 11 of the Bankruptcy Code as well. Seeking to initiate foreclosure proceedings, Farmers filed an adversary proceeding in March's bankruptcy case in the United States Bankruptcy Court for the Eastern District of Virginia for relief from stay or, alternatively, to declare the stay inapplicable in both the March case and the Stockbridge case. Dr. March did not oppose relief from the stay, but Kittay opposed the declaratory relief sought, asserting that the United States Bankruptcy Court for the Southern District of New York, wherein the Stockbridge case was filed and pending, had exclusive jurisdiction, pursuant to 28 U.S.C. §1334(d), to determine the scope and

applicability of its stay. The bankruptcy court concurred, dismissing Farmer's motion with respect to Stockbridge.

Farmers appealed to the United States District Court for the Eastern District of Virginia. In its opinion, the district court acknowledged that 28 U.S.C. §1334(d) grants to the district court in which a case under Title 11 is commenced or is pending exclusive jurisdiction of all of the property, wherever located, of the debtor and of property of the debtor's estate. The district court also found that the junior liens held by Stockbridge were property of its bankruptcy estate. It went on to say, however, that this was not the issue before it for decision. According to the district court, "The dispositive issue is whether the property owned by a nondebtor becomes property of the bankrupt estate because the debtor

holds junior liens on the property." In other words, the district court felt that only the realty, itself, would be affected by the foreclosure. The fact that foreclosure would also extinguish the Stockbridge deeds of trust was of no moment; that action was considered outside the protection of the § 362 stay. The district court therefore held that the automatic stay did not apply and Farmer's foreclosure could proceed.

Seeking to avert a foreclosure which would extinguish his lien and believing that only the New York bankruptcy court had jurisdiction to issue an injunction against foreclosure under 11 U.S.C. § 105 -- which issue had not been presented to the Virginia bankruptcy or district court -- Kittay applied for and obtained a temporary restraining order ("TRO") from the bankruptcy court in New York under

§105 of the Bankruptcy Code. Following an emergency hearing brought on by Farmers, the United States District Court for the Eastern District of Virginia directed that the TRO issued by the New York bankruptcy court be dissolved, enjoined Kittay from proceeding in New York, and permitted the foreclosure to proceed.

On appeal, the United States Court of Appeals for the Fourth Circuit determined that the automatic stay issue was moot because the foreclosure had in fact occurred, no stay pending appeal having been secured. The court of appeals further held that the district court did not abuse its discretion in issuing the injunction pursuant to the All Writs Act. The merits of the case, including whether the district court had any jurisdiction at all in the matter, were not addressed.

Kittay sought a rehearing in banc, which the court of appeals denied on April 5, 1993. In his petition for rehearing, Kittay pointed out that the court of appeal's holding that the district court did not abuse its discretion pursuant to the All Writs Act was dependent upon the existence of jurisdiction, as the All Writs Act does not confer jurisdiction, but can only be invoked to enforce an order where jurisdiction already exists. Kittay argued that the resolution of the jurisdictional issue under § 1334(d) required an examination of the merits of the appeal: Whether Kittay's subordinate but valuable lien interest constitutes property of Stockbridge Funding Corporation's estate. Finally, Kittay argued that the question of jurisdiction was not rendered moot by the completion of the foreclosure by Farmers for several

reasons, not the least of which is that if the district court lacked jurisdiction, the injunction would fall and Kittay would be free to proceed in bankruptcy court in New York for compensatory and other damages.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals for the Fourth Circuit sanctions a radical departure from the accepted and usual course of judicial proceedings regarding bankruptcy jurisdiction. Such a departure threatens the national bankruptcy system envisioned by Congress and codified in the Bankruptcy Code. Moreover, in its implicit finding that the district court had jurisdiction, the opinion below is in direct conflict with opinions of the Court of Appeals for the Second Circuit in Fidelity Mortgage Investors v. Camelia Builders, 550 F.2d 47 (2d Cir. 1976) and

the Court of Appeals for the Sixth Circuit in In re Delorean Motor Company, 1993 U.S. App. LEXIS 10050 (6th Cir. 1993). In addition, the opinion below represents a significant departure from decisions of the Court of Appeals for the Fourth Circuit in In re Geris, 973 F.2d 318 (4th Cir. 1992) and A.H. Robbins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986). Most importantly, the opinion below contravenes the exclusive jurisdictional mandates of 28 U.S.C. § 1334(d). Finally, the opinion's tacit holding that the district court had jurisdiction represents a departure from this Court's holding in Segal v. Rochelle, 382 U.S. 375, and cannot be reconciled with this Court's decision in United States v. Whiting Pools, Inc., 462 U.S. 198.

The court of appeals sanctions a departure from accepted legal principles

by declaring moot the issue concerning the applicabiity of the automatic stay in the Stockbridge case. The court of appeals also departed from the normal course of judicial proceedings by declaring that the district court did not abuse its discretion when it enjoined Kittay from proceeding in the New York bankruptcy court. The proper issue to be decided by the court of appeals was not whether the district court abused its discretion in issuing an injunction pursuant to the All Writs Act, but whether the district court was ever vested with jurisdiction to grant Farmer's the relief it sought in the first place. This necessarily required an examination of Farmer's position on the applicability of the automatic stay, which, in turn, required interpretation of the term "property of the estate" in 11

U.S.C. § 1334(d), issues which the court of appeals failed to consider.

Furthermore, the court of appeals ignored the fact that Kittay was proceeding in New York not only with regard to stay issues under § 362, but also under § 105 of the Bankruptcy Code, which confers power on the bankruptcy court to take any action necessary to carry out the provisions of the Bankruptcy Code. The district court's injunction prohibited Kittay as trustee from taking any action pursuant to § 105, over which the district court had absolutely no jurisdiction. Stripping Kittay of his rights under § 105 represents a radical departure from established bankruptcy procedure.

By neglecting to confront the jurisdictional issues in this case, the court of appeals struck a crippling blow

to the Stockbridge Chapter 11 proceedings pending before the New York bankruptcy court. Approximately one-third of Kittay's assets are subordinate deed of trust interests in various Virginia properties. The creditors looking to those assets are Eastern European immigrants who lost their life savings when Stockbridge collapsed. The state of affairs resulting from the district court's wrongful exercise of jurisdiction and the subsequent affirmance by the court of appeals leaves Kittay in a position of being unable effectively to protect his interests in Virginia, which interests are substantial assets of the Stockbridge estate.

I. Jurisdiction to Issue the Injunction.

The court of appeals did render a decision on the propriety of the injunction issued by the district court, a

point which it did not find moot. The opinion stated that the injunction granted by the district court prohibiting Kittay from proceeding in New York was not an abuse of discretion, as it was authorized by Rule 65 of the Federal Rules of Civil Procedure and by the All Writs Act, 28 U.S.C. § 1651(a). However, the All Writs Act operates only as incident to jurisdiction and may be invoked in district court only as an aid to already existing jurisdiction. United States v. Spadafora, 207 F.2d 291 (7th Cir. 1953). The All Writs Act extends only to those cases in which jurisdiction already exists and not to those where exercise of such power is necessary to acquire jurisdiction. M'Clung v. Silliman, 19 U.S. 598. The statute by itself creates no jurisdiction, but empowers the district court to issue writs in aid of

jurisdiction previously acquired on some other independent ground. Nouse v. Nouse, 450 F. Supp. 97 (D. Md. 1978). Similarly, the Federal Rules of Civil Procedure cannot confer jurisdiction.

The court of appeals first should have examined whether the Virginia district court had jurisdiction before it decided whether the issuance of an injunction in aid of that jurisdiction was proper. If Kittay's subordinate lien constituted property of the estate, 28 U.S.C. § 1334(d) granted exclusive jurisdiction to hear Farmer's motion for relief from stay to the court where the Stockbridge case was filed and was pending. To determine jurisdiction the court of appeals had to resolve the issue of whether Kittay's subordinate lien interests constituted property of the debtor's estate. Contrary to the holding

of the court below, the jurisdiction issue and the scope of the automatic stay could not have been mooted by the foreclosure of the property in question. Other federal decisions and the Bankruptcy Code itself indicate that the district court was without jurisdiction.

II. Exclusive Jurisdiction Over Property of the Estate

Congress has vested "exclusive jurisdiction of all the property, wherever located, of the debtor, as of the commencement of the case, and of the property of the estate" in the district court in which the debtor's case is commenced or is pending. 28 U.S.C. §1334(d). If a question arises as to whether a property interest belonged to a debtor at the commencement of a case, or remains property of an estate, that question must be decided by the court

wherein the case is pending. Fidelity Mortgage Investors v. Camelia Builders, 550 F.2d 47 (2d Cir. 1976), cert. denied, 429 U.S. 1093. Any other result would strip § 1334(d) of its meaning, for jurisdiction to declare property not to be part of an estate is jurisdiction over such property.

The Court of Appeals for the Second Circuit has addressed this issue in Fidelity Mortgage Investors v. Camelia Builders, supra. In Fidelity Mortgage, the Second Circuit noted that the Bankruptcy Act granted exclusive jurisdiction to the bankruptcy court of the debtor and its property, wherever located. Id. at 53. The court went on to state that "[S]tatutes which confide exclusive jurisdiction to specialized courts are not to be construed in a manner which impairs that exclusivity. Exclusive

jurisdiction means exclusive jurisdiction." Id. The court found especially compelling the need for exclusive jurisdiction in bankruptcy proceedings. Id.

In A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994 (4th Cir. 1986), the Fourth Circuit adopted Fidelity Mortgage's construction of exclusive jurisdiction under the Bankruptcy Code, stating that "the stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another." Id. at 998. The court also noted that the key word triggering bankruptcy jurisdiction under the jurisdictional statutes is "property," as

that term is used in the Bankruptcy Code. Id. at 1001.

The Fourth Circuit has spoken on the underlying issue of whether a junior lien constitutes property of the debtor's estate, thus squarely bringing it under the jurisdiction of the bankruptcy court, in In re Geris, 973 F.2d 318 (4th Cir. 1992). In Geris, the Fourth Circuit permitted a foreclosure to proceed despite the automatic stay in the bankruptcy of Geris, a guarantor of a note secured by the subject property. The court reached this result because Geris had no ownership interest in the collateral property. The court noted that had Geris had an ownership interest in the property, the stay would have prevented the foreclosure. According to the court, only an interest in the land which would entitle one to the benefit of the security given for its

payment, such as that of a junior mortgagee, could invoke the stay provisions. Id. (citing Gatewood v. Gatewood, 75 Va. 407 (1881) for definition of lienholder with interest in property).

This Court has addressed the "estate property" definition issue as well in Segal v. Rochelle, 382 U.S. 375, cited in Fidelity Mortgage, supra. In Segal, the Court stated that in bankruptcy contexts, the term "property" has been construed most generously and an interest is not outside its reach because the property interest is novel or contingent or because enjoyment must be postponed. Id. at 379. According to the court in Fidelity Mortgage, Segal made clear that a deed of trust interest was a property interest for purposes of the statute which conferred jurisdiction on the bankruptcy court. Fidelity Mortgage, 550 F.2d at 54.

Indeed, according to the Second Circuit, a deed of trust interest was a property interest within the exclusive jurisdiction of the bankruptcy court. Id. at 55 (emphasis added). The Fourth Circuit's implicit assumption of jurisdiction in this case thus conflicts with decisions both of the Second Circuit and this Court.

The deviation from accepted bankruptcy practice sanctioned by the Court of Appeals for the Fourth Circuit results from an apparent misreading of this Court's decision in United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), upon which the district court heavily relied. The district court cited a footnote in Whiting Pools for the proposition that, "[T]he legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor

interest such as a lien or bare legal title." The district court opinion went on to state that, by this footnote, the Court acknowledged a distinction between a lien interest in property and the property itself, thereby illustrating the boundaries of the Bankruptcy Code's definition of "property of the estate" under 11 U.S.C. § 541.

In Whiting Pools, the debtor, Whiting Pools, Inc. ("Whiting") filed for relief under Chapter 11 of Title 11 of the United States Code. The Internal Revenue Service ("IRS"), having seized personal property belonging to the debtor and desiring to proceed with the sale of the property, filed a motion seeking a declaration that the automatic stay provisions of 11 U.S.C. § 362(a) did not apply, or in the alternative, for relief from stay.

Whiting counterclaimed for turnover of the property.

The bankruptcy court ruled that the stay did indeed apply to the IRS and refused to lift the stay because the property was essential to the reorganization. On Whiting's counterclaim, the court ordered that the IRS return the seized property to the estate. The district court reversed, but was subsequently reversed, in turn, by the Court of Appeals for the Second Circuit. This Court granted certiorari to resolve a conflict among the circuits on whether Section 542(a) of the Bankruptcy Code authorized turnover orders against the IRS.

To determine whether IRS could be compelled to surrender the seized property, this Court had to determine whether the property constituted "property

of the estate." The Court looked to 11 U.S.C. § 541(a), which declared the estate to be "comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." The Court read this section together with §§ 363 and 542 to define what was included in the estate, rather than what was excluded. Whiting Pools, 462 U.S. at 202-03. The Court noted that "Congress intended a broad range of property to be included in the estate." Id. at 204. Based on the foregoing, the Court concluded that the seized property did belong to the estate.

The Whiting Pools footnote does not support the conclusion that Kittay's lien is not subject to the automatic stay's protection. The entire text of the footnote actually reads as follows:

Section 541(a)(1) speaks in terms of the debtor's "interests . . . in property," rather than property in which the debtor has an interest, but this choice of language was not meant to limit the expansive scope of the section. The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title. See 124 Cong. Rec. 32399, 32417 (1978) (remarks of Rep. Edwards); id., at 33999, 34016-34017 (remarks of Sen. DeConcini); cf. § 541(d) (property in which debtor holds legal but not equitable title, such as a mortgage in which the debtor retained legal title to service or to supervise servicing of the mortgage, becomes part of the estate only to the extent of legal title); 124 Cong. Rec. 33999 (1978) (remarks of Sen. DeConcini) (§541(d) "reiterates the general principle that where the debtor holds bare legal title without any equitable interest, . . . the estate acquires bare legal title without any equitable interest in the property"). Similar statements to the effect that § 541(a) (1) does not expand the rights of the debtor in the hands of the estate were made in the context of describing the principle that

> the estate succeeds to no more or greater causes of action against third parties than those held by the debtor. See H.R. Rep. No. 95-595, pp. 367-68 (1977). These statements do not limit the ability of a trustee to regain possession of property in which the debtor had equitable as well as legal title.

Id. at 204 (emphasis added).

When taken in its entirety this passage takes on quite a different meaning, particularly with regard to liens held by a trustee, from that suggested in the excerpt cited by the district court. Property of the estate can include equitable, as well as legal interests, but only to the extent of that interest. In fact, congressional intent as derived from the complete legislative history of § 541 is even more supportive of Kittay's position with regard to liens held by a trustee than would appear from Whiting Pools:

> [S]ection 541(a) is an all-embracing definition which includes charges on property, such as liens held by the debtor on property of a third party, or beneficial rights and interests that the debtor may have in property of another. However, only the debtor's interest in such property becomes property of the estate.

124 Cong. Rec. 32399 (1978) (remarks of Rep. Edwards); 124 Cong. Rec. 33999 (1978) (remarks of Sen. DeConcini).

Based upon this legislative history, it is evident that Congress intended an expansive concept of "property of the estate" in § 541(a). Such an expansive definition must include the deed of trust interest held by Kittay. It is only when the debtor holds bare legal title, having transferred the beneficial or equitable interest in a lien to another, that the lien is not considered part of the estate. This interpretation is borne out by §541(d) which states that such property

interests are part of a bankruptcy estate only to the extent that the debtor has not sold the beneficial interest therein.

Whether or not property of the estate is involved is a question which must, in the first instance, be resolved by the court in which the bankruptcy case was filed or is pending. The companion cases of In re Coleman American Companies, Inc., 6 B.R. 251 (Bktcy. D. Col. 1980) ("Coleman, Colorado") and In re Coleman American Companies, Inc., 8 B.R. 348 (Bktcy. D. Kan. 1981) ("Coleman, Kansas") are particularly illustrative of the problems which can result from deviations from this principal. On March 5, 1980, Coleman American Companies, Inc. ("Coleman") and a subsidiary filed for relief under Chapter 11 of the Bankruptcy Code in United States Bankruptcy Court for the Eastern District of Kansas. In July

of that year, Littleton National Bank ("LNB") filed for relief from the automatic stay against Coleman and the subsidiary, but initiated the proceeding in the United States Bankruptcy Court for the District of Colorado. Coleman and its subsidiary objected to the jurisdiction of the Colorado bankruptcy court and moved to dismiss the proceeding. The Colorado bankruptcy court overruled the motion to dismiss and determined that it had jurisdiction to hear LNB's request for relief from stay. Coleman, Colorado, supra.

On December 17, 1980, Coleman and its subsidiary filed an application with the United States Bankruptcy Court for the District of Kansas, wherein the two Chapter 11 cases were pending, seeking an order to show cause to have LNB punished for contempt for violation of the

automatic stay. The facts alleged in support of the application involved the proceedings initiated by LNB in bankruptcy court in Colorado. The Kansas court determined that it had exclusive jurisdiction of the Chapter 11 cases of Coleman and its subsidiary, including all property of the debtors, wherever located. Further, it found that its assumption of jurisdiction preempted jurisdiction of all other courts, with the exception of appeals to courts of appellate jurisdiction. The Kansas court further stated that the automatic stay arose as a direct result of the filings by Coleman and its subsidiary of the Chapter 11 petition in the District of Kansas, adding that "an action to lift the stay has no life of its own independent of the primary proceeding from which it flows and but for the primary proceeding could not be filed

anywhere." Later, the court pointed out that "the stay imposed by the Kansas filing is similar to an injunction and courts of equal rank may not vacate one another's stay or injunction." Coleman, Kansas, supra at 388, 389. This reasoning was further developed with the following observation:

> One of the purposes of bankruptcy is to afford debtors the ability to bring order to their affairs. As stated in Fidelity Mortgage Investors, [citation omitted], the need to centralize bankruptcy-related proceedings and prevent a chaotic scramble for the debtor's assets is an interest of paramount importance in the bankruptcy laws. The automatic stay of [former] Rule 11-44 is designed to prevent a chaotic and uncontrolled scramble for the debtors' assets in a variety of uncoordinated proceedings in different courts. The stay ensures that the debtors' affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with

> one another. ... If it were otherwise, a debtor, be he in Chapter 7, 11 or 13, rather than have his litigation centralized would be amenable to suit throughout the United States, its territories and possessions. Precious energy and resources would be expended by those debtors who could afford travel and other expenses related to litigating in multiple jurisdictions. For those who could not afford the travel and expense, default would await.

Id. at 289.

Even if the United States District Court for the Eastern District of Virginia could determine applicability of the Stockbridge stay, a recent opinion from the Sixth Circuit suggests that it would be impossible to do so without obtaining leave of court from the home bankruptcy court. In In re Delorean Motor Co., 1993 U.S. App. LEXIS 10050, the Sixth Circuit strongly reiterated the well-settled principle that leave of the appointing forum must be obtained by any party

wishing to institute an action in a non-appointing forum against a trustee for acts done in the trustee's official capacity and within the trustee's authority as an officer of the court. Id. at 10050.

Farmers filed an adversary proceeding against Kittay in a forum other than that in which the Stockbridge bankruptcy was pending concerning administration of his estate and even went so far as to have him enjoined from seeking the protection of his home court with regard to his lien holdings in Virginia. Farmers neither obtained nor sought permission of the appointing forum in New York. Farmers paid the necessary filing fee for an adversary proceeding, but titled its action a motion to determine inapplicability of the stay. This does not change the fact that it was an action

for declaratory judgment against the trustee, instituted without leave of the New York bankruptcy court.

In Delorean, the trustee was able to recover in bankruptcy court actual damages, including costs, attorney's fees, and administrative expenses incurred as a result of the inappropriate filing. Kittay has been enjoined from pursuing a similar remedy. This result, sanctioned by the opinion below, represents a clear and radical departure from the protections afforded the Trustee under the Bankruptcy Code, as outlined by the Sixth Circuit in Delorean.

III. Trustee's Right to Remedies Under §105

After Farmers obtained the approval of the district court to proceed with its intended foreclosure, Kittay returned to the New York bankruptcy court, in keeping

with the precedent set by the Coleman cases, supra, to seek protection for his estate under § 105 of the Bankruptcy Code. Contrary to the district court's assertions in entering its injunction, Kittay was not proceeding in New York on the same issue as decided by the district court in its May 29, 1992 order construing the automatic stay. As asserted on Kittay's behalf in the briefs and at oral argument, the New York proceedings included a request for relief under 11 U.S.C. § 105, an issue separate and apart from construction of the stay.

Kittay testified in the district court that § 105 afforded the trustee the right to seek an injunction in the bankruptcy court to aid in his reorganization case. Paragraph four of the complaint filed in the New York case states that the adversary proceeding was

brought pursuant to 11 U.S.C. § 105 to restrain Farmers from proceeding with the foreclosure. This issue was never addressed or decided by the district court.

This fact was overlooked in the Court of Appeals opinion which stated, "[T]he question raised by Kittay in the New York bankruptcy court was identical to that decided by the Virginia district court and appealed to the Fourth Circuit." Indeed, the question was not the same. The propriety of the injunction in light of Kittay's right to proceed under § 105 should have been considered. The Fourth Circuit's failure to consider the argument based on § 105 sanctions yet another departure from established bankruptcy practice.

A bankruptcy court's injunctive power under § 105 is greater in scope than the

reach of the automatic stay. Section 105 gives the bankruptcy court the absolute power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. In A.H. Robbins, the Fourth Circuit noted that the statutory power of the bankruptcy court to stay actions involving the debtor or its property is not limited to the automatic stay provisions of § 362. 788 F.2d at 1001. According to the court in A.H. Robbins, it repeatedly has been held that under § 105 the bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. Id.

The power afforded the bankruptcy court under § 105 is even more extensive than that afforded by the All Writs Act, upon which the Court of Appeals relied in

affirming the district court's enjoining Kittay from seeking further relief from the New York bankruptcy court. See Legislative History, 11 U.S.C. § 105 (stating that section is intended to cover any powers traditionally exercised by bankruptcy court that are not encompassed by the All Writs Act). By upholding the injunction against all parties from litigating or even appearing before the New York bankruptcy court, the court of appeals effectively eviscerated §105.

Finally, evidence should have been taken under §105 of the bankruptcy code on the value of the debtor's estate in the home bankruptcy court. The district court refused to permit Kittay to put on any such evidence; in its opinion, the district court said that its ruling could be made as a matter of law. At no time in the proceedings thus far has any evidence

been adduced on the monetary value of the subordinate deed of trust interests that Kittay holds. Kittay believes that at an evidentiary hearing he could establish that, after the marshalling of assets and avoidance of fraudulent transfers, he could recover in excess of $400,000.00 for the debtor's estate, even after paying off Farmer's first deed of trust. Only if Kittay is given the opportunity to proceed in New York, where jurisdiction is proper for such an inquiry, will he be able to put on this evidence and realize this recovery.

III. Kittay's Appeal is Not Rendered Moot by Farmer's Foreclosure.

Because Kittay could otherwise return to New York for compensatory and other damages, the overlooked issue of jurisdiction is not moot. If the district court is found to have been without

jurisdiction, Kittay will be free to plead his case before the bankruptcy court in New York. Because Farmers was the purchaser of the subject property at the foreclosure sale and is believed still to be its owner, the foreclosure sale can, even now, be reversed without adversely affecting the rights of outside parties. Additionally, the appeal is not moot because Kittay's remedies in the event of a reversal of the district court are not limited to an equitable reversal of the foreclosure sale. In In the Matter of Springpark Associates, 623 F.2d 1377 (9th Cir. 1980), a foreclosure and mootness case, the court observed that the sale of the subject property had not mooted the issues on appeal because alternative remedies were available to the appellate court should it be found that the court below erred. Springpark, supra, at 1379.

In the instant case, if the Court decides that the district court was without the requisite jurisdiction, Kittay may pursue action against Farmers in the New York bankruptcy court for taking action against the trustee and for violation of the automatic stay, seeking both sanctions and compensatory damages. The jurisdictional issue also remains vital to the remainder of the Stockbridge estate, which consists primarily of junior lien interests, including additional liens held on parcels in Virginia. While other similarly situated senior lienholders have sought relief from stay in the Stockbridge case from the bankruptcy court in New York, others may not. Thus, the situation is a classic example of a case which is "capable of repetition, yet evading review." Such cases are exceptions to the mootness doctrine. Southern Pacific

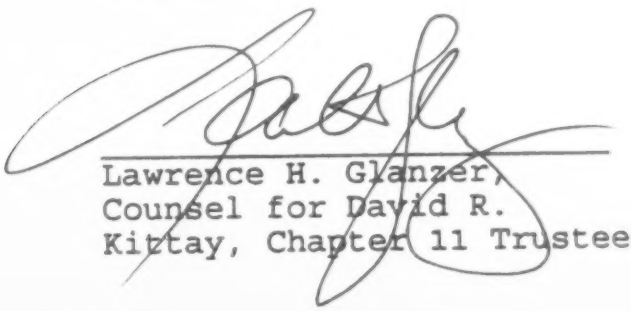
Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515.

In seeking a writ of certiorari, Kittay seeks vindication of the legal principle that the home bankruptcy court has exclusive jurisdiction of the bankrupty estate, wherever located. It is this legal principle from which the court below so clearly departed, hamstringing Kittay in his efforts to recover even pennies on the dollar for the Stockbridge investors' estate, much of which consists of junior lien interests in other jurisdictions throughout the United States. Such a departure should not be countenanced. Only review and reversal by this Court can remedy the deleterious effects of the decisions below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Lawrence H. Glanzer,
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Co-Counsel for Petitioner

APPENDIX

I. *Lower Court Opinions and Orders*

(i) Farmers Bank v. Kittay (*In re* March), 988 F.2d 498 (4th Cir. 1993), 1993 U.S. App. LEXIS 4306. . . . . A-1

(ii) Farmers Bank v. Kittay (*In re* March), 140 Bankr. 387 (E.D. Va. 1992), 1992 LEXIS 8090. A-13

(iii) Farmers Bank v. Kittay (In re March), No. 91-2300-B (Bankr. E.D. Va. Dec. 10, 1991) . A-27

(iv) Farmers Bank v. Kittay (*In re* March), No. 92-1695 (4th Cir. April 5, 1993). A-32

II. *Statutes*

11 U.S.C. § 105 . . . . . A-34

11 U.S.C. § 362(a) & (b). A-35

11 U.S.C. § 363(f). A-47

11 U.S.C. § 541 . . . . . A-49

28 U.S.C. § 157(a). A-57

28 U.S.C. § 1334. . . . . A-58

28 U.S.C. § 1409. . . . . A-61

28 U.S.C.A. § 1651. . . . . A-64

In re Lloyd C. MARCH, Jr.,
Debtor. (Two Cases)

FARMERS BANK, Plaintiff-Appellee
v.
David R. KITTAY, Chapter 11 Trustee
for Stockbridge Funding Corporation,
Defendant-Appellant,

Lloyd C. March, Jr. Defendant-
Appellee. (Two Cases)

Nos. 92-1695, 92-1844

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

November 30, 1992, Argued
March 8, 1993, Decided

Senior lienholder sought declaration that automatic stay in Chapter 11 case in Southern District of New York did not apply to foreclosure action against property owned by nondebtor and on which Chapter 11 debtor held junior liens. The Bankruptcy Court dismissed for lack of jurisdiction over bankruptcy proceeding in the Southern District of New York. Senior lienholder appealed. The United Stated

lienholder appealed. The United Stated District Court for the Eastern District of Virginia, Rebecca Beach Smith, J., 140 B.R. 387, held that the automatic stay did not prevent foreclosure by senior lienholder, and the Chapter 11 trustee appealed. The Court of Appeals, Murnaghan, Circuit Judge held that (1) appeal of foreclosure issue had been rendered moot by sale of the property, and (2) Virginia district court judge acted within her discretion under the All Writs Act by enjoining further proceeding by the trustee in the New York bankruptcy court.

Affirmed by published opinion.

David Roy Kittay, David R. Kittay, P.C., White Plains, NY, argued; Lawrence H. Glanzer, Pender & Coward, P.C., Virginia Beach, VA, on brief, for appellant.

Peter Gilbert Zemanian, Willcox & Savage, P.C., Norfolk, VA, argued; Ross C. Reeves, J. Steven Patterson, Willcox &

Savage, P.C., Norfolk, VA; James R. Sheeran, Marcus, Santoro & Kozak, Portsmouth, VA, on brief, for appellees.

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and MURNAGHAN and LUTTIG, Circuit Judges.

OPINION

MURNAGHAN, Circuit Judge:

Farmers Bank was a first priority lienholder of two parcels of real estate in Virginia. Two junior, i.e., inferior, lienholders filed for bankruptcy, one in the Eastern District of Virginia, the other in the Southern District of New York. Because the owner of the real estate, Oceans Holding, Inc., did not meet its obligations under the first priority liens (deeds of trust), Farmers Bank decided to foreclose on both parcels. To make sure that the automatic stays[1] under

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[1] *See* 11 U.S.C. § 362(a).

both bankruptcy proceedings would not be violated, Farmers Bank moved in the bankruptcy court for the Eastern District of Virginia for relief from the stays, alternatively requesting a determination that the stays did not apply to block foreclosure of the first priority lien interests. The debtor in the Virginia proceeding did not oppose Farmers Bank's foreclosure. The Virginia bankruptcy court ruled that the stay in the Virginia proceeding did not extend to Farmers Bank's intended foreclosure; however, with respect to the debtor in New York, the bankruptcy court dismissed on lack of jurisdiction grounds questions relating to the New York bankruptcy proceeding.

On appeal by Farmers Bank from the Virginia bankruptcy court decision concerning the New York debtor, the district court in the Eastern District of

Virginia determined that jurisdiction was present and that the stays did not reach the first priority lien interests claimed by Farmers Bank, at most extending to subordinate liens held by the bankruptcy debtor.

As opposed to seeking a stay from the district court in Virginia or the Fourth Circuit Court of Appeals pending his appeal to the latter court, David Kittay, the trustee of the New York bankruptcy debtor, sought in New York to enjoin Farmers Bank from proceeding with the foreclosure. The New York bankruptcy court granted a temporary restraining order and a show cause order why Farmers Bank should not be held in contempt in proceeding with the foreclosure. Subsequently, the Virginia district court, on Farmers Bank's request, forbade further process in the New York case by Kittay or Farmers Bank.

The foreclosure then was conducted by Farmers Bank, extinguishing the secondary liens held by the New York and Virginia debtors.

On appeal, Kittay challenges the Virginia district court's holding that the automatic stay of § 362(a) does not prevent foreclosure by Farmers Bank, as the senior lienholder, on the property in which the New York debtor holds a junior lien interest. Kittay, however, failed to obtain a stay of the district court's order pending appeal and thereby allowed Farmers Bank to foreclose on the property at issue before the present appeal was heard. Consequently, the foreclosure rendered moot any appeal on the applicability of the § 362(a) stay. *See, e.g., In re Sullivan Central Plaza, I, Ltd.*, 914 F.2d 731, 733 (5th Cir. 1990) ("If the debtor fails to obtain a stay,

and if the property is sold in the interim, the district court will ordinarily be unable to grant any relief. Accordingly, the appeal will be moot."); *In re Lashley*, 825 F.2d 362, 364 (11th Cir. 1987) ("When a debtor does not obtain a stay pending appeal of a bankruptcy court order setting aside an automatic stay and allowing a creditor to foreclose on property the subsequent foreclosure renders moot any appeal,"), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1051, 98 L. Ed. 2d 1013 (1988).

The remaining issue raised by Kittay on appeal is whether the district court abused its discretion by enjoining further proceedings between Kittay and Farmers Bank in the New York bankruptcy court. After the Virginia district court ruled in an opinion and order that the automatic stay in the New York bankruptcy proceeding

did not extend to Farmers Bank's planned foreclosure, Kittay filed a complaint raising the same question in the New York bankruptcy court. He did so despite the fact that he had appeared before the Virginia district court and filed an appeal from its holding in the Fourth Circuit Court of Appeals. The New York bankruptcy court, in response to Kittay's complaint and simultaneous request for a temporary restraining order, prohibited Farmers Bank, which never had appeared before it, from proceeding with the foreclosure sale that the Virginia district court previously had permitted.

Farmers Bank, wishing to complete its foreclosure on the Virginia real estate, filed a motion in the Virginia district court to enjoin Kittay from proceeding with his complaint filed in New York and to enjoin both Kittay and itself from

participating in any further proceedings regarding that case.

The Virginia district judge, following a hearing where both parties were represented by counsel, granted Farmers Bank's requested injunction. In so doing, the district judge did not abuse her discretion, but rather acted within her authority under the All Writs Act, 28 U.S.C. § 1651(a), as well as, the Federal Rules of Civil Procedure, Rule 65.

The All Writs Act empowers a federal court to enjoin parties before it from attempting to relitigate decided issues and to prevent collateral attack of its judgments. *See, e.g., Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1523-24 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081, 79 L. Ed. 2d 765, 104 S. Ct. 1446 (1984); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent*

Litig., 140 Bankr. 969, 973-974 (N.D. Ill. 1992); *In re Ocean Ranger Sinking off Newfoundland*, 617 F. Supp. 435, 436, 439 (E.D. La. 1985). While that power obviously is circumscribed,[2] its use was justified here for several reasons. First, the question raised by Kittay in the New York bankruptcy court was identical to that decided by the Virginia district court and appealed to the Fourth Circuit. Ergo, Kittay had sufficient opportunity to obtain relief if he believed the Virginia district court's ruling was wrong.

In addition, Kittay, by not seeking a stay of the foreclosure in either the Virginia district court or the Fourth Circuit, failed to take advantage of the

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[2] *See In re Baldwin-United Corp. Litigation*, 765 F.2d 343, 347-349 (2d Cir. 1985) (recognizing that such authority exists but ruling it was exercised inappropriately in the instant case).

legal options available to him to protect, pending appeal, the New York debtor's lien interests in the Virginia property. Instead, Kittay sought to circumvent the proceedings in this jurisdiction, where the realty subject to liens was located and to which he had subjected himself by appearing in the original matter and filing a subsequent appeal, by requesting relief from a lower court in another jurisdiction. The district judge correctly characterized Kittay's action as nothing more than an attempt to end run, at the last minute,[3] the district court's judgment. In light of the foregoing, the district court prudently exercised [*8]

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[3] Kittay filed for a TRO in the New York bankruptcy court at 3 p.m. on June 25, 1992, almost one month after the Virginia district court's opinion and order, but less than four days prior to Farmers Bank's scheduled foreclosure sale.

her power to enjoin the bankruptcy court proceedings.

In conclusion, we are unable to address the issue of the scope of a § 362(a) stay because it has been mooted by the foreclosure of the property in question. Additionally, we hold that the district judge did not abuse her discretion by enjoining any further proceedings on that question in the New York bankruptcy court. Therefore, the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE: LLOYD C. MARCH, JR.,
THE FARMERS BANK,
Plaintiff/Appellant
v. LLOYD C. MARCH, JR.,
Defendant and DAVID R. KITTAY,
Chapter 11 Trustee for
STOCKBRIDGE FUNDING CORP.,
Defendant/Appellee.

ACTION No. 2:92cv61

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

140 Bankr. 387; 1992 U.S. Dist. LEXIS 8090

May 29, 1992, Decided
May 29, 1992, Filed

Attorney for Plaintiff/Appellant: Peter G. Zemanian, Esquire, J. Steven Patterson, Esquire, Willcox & Savage, 1800 NationsBank Center, Norfolk, Virginia 23510.

Attorney for Defendant: James Robert Sheeran, Esquire, Marcus, Santoro & Kozak, 341 High Street, Post Office Drawer 69, Portsmouth, Virginia 23705.

Attorney for Appellee/Defendant: Lawrence Hoyt Glanzer, Esquire, Douglas J. Glenn, Esquire, Pender & Coward, Fourth Floor, Greenwich Centre, 192 Ballard Court, Virginia Beach, Virginia 23462-6530.

JUDGES: Smith

OPINION BY: REBECCA BEACH SMITH

OPINION AND ORDER

This matter comes before the court on appeal from the order of the United States Bankruptcy Court for the Eastern District of Virginia, entered January 7, 1992. Lloyd C. March petitioned for bankruptcy relief under Chapter 11 on November 11, 1991, in the Eastern District of Virginia. David R. Kittay is the trustee for Stockbridge Funding Corp. (hereinafter "Stockbridge"), a debtor proceeding under Chapter 11 in the Southern District of New York, after filing an involuntary Chapter 7 on January 4, 1991. The Farmers Bank (hereinafter "Farmers") is the beneficiary

under a first-priority deed of trust encumbering two parcels of real estate located in Suffolk, Virginia, that are owned by a nondebtor third party.[1] Farmers wishes to begin Virginia state law foreclosure proceedings on these parcels. March and Stockbridge each hold junior liens on the two parcels.[2]

To ensure that its foreclosure on the two parcels does not violate the automatic stay imposed by 11 U.S.C. § 362(a), Farmers moved against March and Stockbridge for relief from the stay and, alternatively, for a declaration that the

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[1] Ocean Holdings, Inc., a defunct corporation that is not presently in bankruptcy, owns the two parcels.

[2] March holds a fourth-priority deed of trust lien on one parcel and a second-priority deed of trust lien on the second parcel. Kittay holds a sixth-priority deed of trust lien on one parcel and a fifth-priority deed of trust lien on the other.

stay does not apply to its foreclosure. March did not contest Farmers' motion to modify the automatic stay, and the bankruptcy court thus lifted the stay as to March and dismissed as moot Farmers' request for declaratory relief against March. The bankruptcy court, however, dismissed Farmers' request for declaratory relief against Stockbridge, asserting a lack of jurisdiction over the bankruptcy proceeding in the Southern District of New York.

Farmers appeals the bankruptcy court's decision as to Stockbridge and asks this court to exercise jurisdiction over the matter and to declare that the automatic stay, imposed by 11 U.S.C. § 362(a), does not apply to enjoin a first mortgagee from foreclosing on property not owned by the bankrupt debtor, but on which the debtor holds a junior lien. Farmers

argues that the bankruptcy court for the Southern District of New York does not have exclusive jurisdiction over this Virginia property, and that the provisions of the automatic stay do not apply to these parcels, because they are not property of the debtor, as a nondebtor owns them, and Stockbridge's minor lien interests, by themselves, do not convert these parcels into property of the estate. Resolution of these issues does not depend on the further finding of any disputed facts and can be decided by this court as a matter of law.

Title 28 U.S.C. § 1334(d) confers on "the district court in which a case under title 11 is commenced or is pending . . . exclusive jurisdiction of all of the property, wherever located, of the debtor . . . and of property of the estate." Absent this exclusive jurisdiction, the

court for the Eastern District of Virginia has jurisdiction and is an appropriate venue for resolution of this matter. See 28 U.S.C. §§ 1334(b), 1409(a).[3] Likewise,

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[3] Section 1334(b) confers jurisdiction on the district courts in "all civil proceedings . . . related to cases under title 11." Section 1409(a) then provides that "a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending." (emphasis added). Because section 1409(a) uses the term "may," the section is permissive rather than mandatory and, thus, reflects a legislative purpose to promote flexibility in determining proper bankruptcy venue. *See Brock v. American Messenger Serv., Inc.*, 65 B.R. 670, 672 (D.N.H. 1986) (§ 1409(a) directs where action may be brought, not where action must be brought); *In re Continental Air Lines, Inc.*, 61 B.R. 758, 769 (S.D. Tex. 1986) (§ 1409(a) is not an exclusive venue provision); *see also, Littleton Nat'l Bank v. Coleman Am. Cos. (In re Coleman Am. Cos., Inc.)*, 6 B.R. 251, 254 (Bankr. D. Colo. 1980) ("It was not the intent of Congress to grant jurisdiction over all bankruptcy matters to only the bankruptcy court for the district in which a case under title 11 is commenced."). Thus, these statutes allow proceedings related to cases under title 11 to be adjudicated in districts other than the one in which

the automatic stay protects only "property of the debtor" and "property of the estate." 11 U.S.C. § 362(a). Section 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." Stockbridge

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the case is pending.

The property upon which Farmers seeks to foreclose is located in Virginia, thus making venue more convenient to all interested parties. The owners of the property reside in Virginia, as do all junior lienholders, except for Stockbridge. Venue in Virginia also furthers the interests of justice in that to require a first mortgagee to travel to the venue of a fifth- or sixth-priority lienholder would be unfair. Moreover, the Stockbridge loan documents apparently were executed in Virginia, and Virginia law will control the foreclosure proceedings and the payment of the proceeds, if any, to Stockbridge's bankrupt estate as a result of the foreclosure. *See generally H. J. Volvi Contractors, Inc. v. W-P Coal Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 123 B.R. 537, 539 (Bankr. W.D. Pa. 1991) (stating factors that determine appropriateness of venue in bankruptcy proceedings).

holds junior liens on property owned by a nondebtor. Property of Stockbridge's estate clearly includes these junior liens. The dispositive issue is whether the property owned by a nondebtor becomes property of the bankrupt estate because the debtor holds junior liens on the property.

Although the Bankruptcy Code does not specifically address this situation, the language of the relevant provisions and the authorities interpreting the Code and addressing the issue persuade this court that a debtor's junior lien interest does not convert the underlying secured property owned by another into property of the bankrupt estate, subject to the provisions of the automatic stay. First, nothing in the provisions of the automatic stay itself protects a debtor's junior

lien interests.[4] Other courts considering the issue have concluded that the automatic stay, imposed by 11 U.S.C. § 362(a), does not prevent nonjudicial

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[4] Congress enacted the automatic stay to protect debtors from the collection efforts, harassment, and foreclosure actions of creditors against property of the estate. The stay relieves the financial pressures that thrust the debtor into bankruptcy and permits the debtor to develop a repayment or reorganization plan. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41. As one commentator has pointed out, the collateral real property, i.e., in this case the two parcels of land owned by a nondebtor, imposed

> no "financial pressures" on the debtor . . . that drove the debtor into bankruptcy. [Stockbridge] is, in fact, a "creditor" with respect to the property just as is the senior secured creditor [Farmers]. It is obvious that the purpose of enacting the automatic stay was not intended to protect a debtor who is actually a creditor.

Thomas J. Holthus, *A Debtor as a "Creditor" and the Automatic Stay*, 62 Am. Bankr. L.J. 377, 380 (1988).

foreclosure of a senior real estate property security interest when the holder of a junior security interest in the same real property files for bankruptcy relief. *See generally* Thomas J. Holthus, *A Debtor as a "Creditor" and the Automatic Stay*, 62 Am. Bankr. L.J. 377 (1988) (discussing the few cases that have addressed this issue and persuasively distinguishing those cases that enforced the automatic stay). *Cf. In re Le Peck Constr. Corp.*, 14 B.R. 195 (Bankr. E.D.N.Y. 1981) (permitting bank's foreclosure on real property despite debtor's mechanic's lien that was junior to bank's deed of trust).

Second, and importantly, the Supreme Court has stated that property of the estate does not include property of others in which a debtor has a minor lien interest:

> Section 541(a)(1) speaks in terms of the debtor's "interests . . . in property," rather than property in which the debtor has an interest, but this choice of language was not meant to limit the expansive scope of the section. The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title. Similar statements to the effect that § 541(a)(1) does not expand the rights of the debtor in the hands of the estate were made in the context of describing the principle that the estate succeeds to no more or greater causes of action against third parties than those held by the debtor. These statements do not limit the ability of a trustee to regain possession of property in which the debtor had equitable as well as legal title.

United States v. Whiting Pools, Inc., 462 U.S. 198, 204 n.8 (1983) (emphasis added) (citations to legislative history omitted). The Court in this footnote acknowledges the distinction between a lien interest in property and the property

itself, thereby illustrating the boundaries of the bankruptcy code definition of estate property.[5]

Accordingly, this court concludes that property of Stockbridge's estate is limited to the junior lien interests and does not include the real property that secures Stockbridge's interests. Because the parcels are not property of the estate, the bankruptcy court for the Southern District of New York does not have exclusive jurisdiction over this

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[5] The facts of *Whiting Pools* are not analogous to the case at bar. The property at issue in *Whiting Pools* was "equipment, vehicles, inventory, and office supplies" owned by the debtor. *Id.* at 200. The Internal Revenue Service had seized the property to satisfy a tax lien, and the Supreme Court addressed the issue of whether the bankruptcy code authorized the bankruptcy court to order the Internal Revenue Service to turn over the property. In its analysis, the Court considered whether the property constituted "property of the estate" under 11 U.S.C. § 541(a) and concluded that it did.

matter and the provisions of the automatic stay do not apply. Venue is proper in the Eastern District of Virginia, and the order of the bankruptcy court dismissing Farmers' motion for declaratory relief is REVERSED. The nonjudicial foreclosure by the senior lienholder, Farmers, on the Virginia property owned by a nondebtor on which Stockbridge holds junior liens may proceed.[6]

The Clerk is DIRECTED to send a copy of this Opinion and Order to all counsel

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[6] Virginia does not require a judicial foreclosure. *See* Va. Code Ann. §§ 55-59 to 55-66 (Michie 1986 & Supp. 1991). In the minority of states that require a judicial foreclosure, provisions of the automatic stay may prevent foreclosure because such foreclosure requires "commencement . . . of a judicial . . . proceeding against the debtor." 11 U.S.C. § 362(a)(1). In such cases, an order granting the relief from the stay may be necessary.

of record and the bankruptcy court.

It is so ORDERED.

Rebecca Beach Smith

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
May 29, 1992

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

IN RE:

LLOYD C. MARCH, JR.,
CASE NO. 91-26357-B
Debtor.

THE FARMERS BANK,

Petitioner,

vs. APN: 91-2300-B

LLOYD C. MARCH, JR.,

and

DAVID R. KITTAY,
Chapter 11 Trustee for
STOCKBRIDGE FUNDING CORP.,

Defendants.

ORDER

THIS MATTER came on for preliminary hearing on December 10, 1991, at 9:00 a.m., upon the Motion for Relief

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Peter G. Zemanian, Esq. VSB 24922
WILLCOX & SAVAGE, P.C.
180-0 Sovran Center
Norfolk, VA 23501
(804) 628-5500

Counsel for Farmers Bank of Windsor from Automatic Stay and Alternative Motion for Declaration of Inapplicability of Stay filed herein by The Farmers Bank, Windsor, Virginia ("Farmers") against Lloyd C. March, Jr. (the "Debtor") and David R. Kittay ("Kittay"), Chapter 11 Trustee for Stockbridge Funding Corp., which is the subject of Chapter 11 proceedings pending in the United States Bankruptcy Court for the Southern District of New York, proceeding no. 91-B-10068(FC) (the "New York Proceeding").

And upon the arguments and representations of counsel, it appearing that the Debtor does not contest Farmers motion for relief against the Debtor, it is

ORDERED that the automatic stay imposed by §362(a) of the Bankruptcy Code, arising in the Debtor's bankruptcy

proceeding, be modified to permit Farmers to exercise such rights and pursue such remedies as Farmers may have against the real property described in Exhibits A & B, attached hereto, under the laws of the Commonwealth of Virginia.

It is further ordered that Farmers' request for declaratory relief against the Debtor be, and it hereby is, dismissed as moot and that Farmers' request for declaratory relief against Kittay be, and it hereby is, dismissed for the reason that the applicability of the stay arising under 11 U.S.C. §362(a) in the New York Proceeding may only be raised in the United States Bankruptcy Court for the Southern District of New York, where the New York Proceeding is pending. This Court expresses no view on whether or not the §362 stay arising in the New York Proceeding would prohibit Farmers from

exercising its state law remedies against the real property described in Exhibits A & B, appended hereto, having no jurisdiction over the matter.

It is further hereby ORDERED that the objection of Farmers to the dismissal of the request for declaratory relief against Kittay be, and it hereby is, preserved.

The Clerk shall mail copies of this Order, upon entry, to Peter G. Zemanian, Esq., WILLCOX & SAVAGE, P.C., 1800 Sovran Center, Norfolk, VA 23510; to James R. Sheeran, Esq., MARCUS, SANTORO & KOZAK, 341 High Street, P. O. Drawer 69, Portsmouth, VA 23704; to Lawrence H. Glanzer, Esq., PENDER & COWARD, P.C., Fourth Floor, 192 Ballard Court, Virginia Beach, VA 23462; to David R. Kittay, Esq., LIDDELL, SAPP, ZIVLEY, HILL & LABOON, 237 Park Avenue, New York, NY 10017; and to Debera F. Conlon, Esq.,

Assistant U.S. Trustee, Office of the U.S. Trustee, Room 625, Federal Building, 200 Granby Street, Norfolk, VA 23510.

DATED: _____

_____
JUDGE

I ask for this:

_____
Peter G. Zemanian, of Counsel
for The Farmers Bank

Seen:

_____
Lawrence H. Glanzer, of Counsel
for David R. Kittay, Trustee for

_____
James R. Sheeran, of Counsel
for Lloyd C. March, Jr.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

April 5, 1993

No. 92-1695
BK-91-2300-B
CA-92-61-2

In Re: LLOYD C. MARCH, JR.

Debtor

FARMERS BANK

Plaintiff - Appellee

v.

DAVID R. KITTAY, Chapter 11 Trustee for Stockbridge Funding Corporation;

Defendant - Appellant

LLOYD C. MARCH, JR.

Defendant - Appellee

No. 92-1844
BK-91-26357-B
CA-92-61-2

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to the Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court
/s/ Bert M. Montague

_____
CLERK

Yours truly,

BERT M. MONTAGUE
Clerk
/s/ Cynthia W. Carter

By: _____

Enclosure(s)
cc: Doris R. Casey

SECTION 105 (11 U.S.C. § 105)

§ 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

SECTION 362 (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78333(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor

that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section

101(34), 741(5), or 761(15) of this title, or settlement payment, as defined in section 101(35) or 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim

against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property or combinations of

property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [sic]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq.,

respectively), or under applicable State law:

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title

XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively); or

(14) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement.

(14) under subsection (a) of this section, of any action by an

accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution; or

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act.

SECTION 363 (11 U.S.C. § 363)

§ 363. Use, sale or lease of property.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute;

(5) such entity could be compelled, in a legal or

equitable proceeding, to accept a money satisfaction of such interest.

SECTION 541 (11 U.S.C. § 541)

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the

debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes

entitled to acquire within 180 days after such date–

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.;

42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution; or,

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that–

(A) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(B) but for the operation of this paragraph, the estate could include such interest only by virtue of section 365 or 544(a)(3) of this title.

(c) (1) Except as provided in paragraph (2) of this subsection, an

interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or

termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not the extent of any equitable interest

in such property that the debtor does not hold.

28 USCS § 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 [11 USCS §§ 101 et seq.] and any or all proceedings arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.] shall be referred to the bankruptcy judges for the district.

28 USCS § 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers e x c l u s i v e jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title

11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of

this title. This subsection shall not be construed to limited the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 USCS § 1409. Venue of proceedings arising under title 11 or arising in or related to cases under title 11.

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.] may be commenced in the district court in which such case is pending.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 [11 USCS §§ 101 et seq.] may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,000 or a consumer debt of less than $5,000 only in the district court for the district in which the defendant resides.

(c) Except as provided in subsection (b) of this section, a trustee in a case under title 11 [11 USCS §§ 101 et seq.]

may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the district court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 [11 USCS §§ 101 et seq.] had not been commenced.

(d) A trustee may commence a proceeding arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.] based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the district court for the district where a State or Federal court

sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

(e) A proceeding arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.], based on a claim arising after the commencement of such case from the operation of the business of the debtor, may be commenced against the representative of the estate in such case in the district court for the district where the State or Federal court sits in which the party commencing such proceeding may, under applicable nonbankruptcy venue provisions, have brought an action on such claim, or in the district court in which such case is pending.

28 USCS § 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge or a court which has jurisdiction.